KTPC Resort Development Bhd v Convobuilt Sdn Bhd and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS B-02(NCVC)(W)-1976–09 OF 2018 AND B-02(NCVC)(W)-2023–10 OF 2018

BADARIAH SAHAMID, HARMINDAR SINGH AND NOR BEE ARIFFIN JJCA

4 FEBRUARY 2020

Contract — Settlement agreement — Arrangement — Appellant and respondent entered into settlement agreement to settle appellant's debt — Appellant assigned apartment units to respondent purportedly as consideration for respondent to pay redemption sum to chargee bank — Whether there was valid commercial reason underlying arrangement — Whether transfer of redemption units was solely for redeeming properties

Trusts and Trustees — Trusts — Existence of — Appellant and respondent entered into settlement agreement to settle appellant's debt — Appellant assigned apartment units to respondent purportedly as consideration for respondent to pay redemption sum to chargee bank — Whether there was constructive trust — Whether beneficial interest in redemption units must be reverted to and revested in appellant

The appellant ('plaintiff') was a developer for a project known as the Kulim Golf & Country Resort within the Kulim Hi-Tech Park ('KGCR'). KGCR included the development of an apartment building known as the Kulim Heights Apartments ('the apartments') and a 27-hole golf resort. The respondent ('defendant') was a construction company which had undertaken works in KGCR for the plaintiff as a contractor. At the material time, the plaintiff was indebted to the defendant for the sum of RM7,758,150.56 for such works ('the debt owed'). In view of the plaintiff's cash flow constraints, the plaintiff and the defendant ultimately agreed to settle the debt owed by entering into a settlement agreement ('the settlement agreement') which consisted of three arrangements. The dispute which arose in the High Court pertained to the underlying arrangement vis a vis the first arrangement in which the plaintiff would assign a total of 58 units of the apartments ('the properties') to the defendant as part payment of the debt owed in lieu of cash payment amounting to RM5,236,590. The properties amounted to a total cash value of RM9,578,370. The reason for a difference between this sum and the sum owed was due to the properties being separated into two categories, ie

A the 'settlement units' and the 'redemption units'. The total number of properties which corresponded to the sum of the first arrangement, that was, RM5,236,590 was 34 units ('the settlement units'). The differential sum of RM4,343,780 ('the differential sum') corresponded to the cash value of 24 units of the properties ('the redemption units'). The properties were at the B material time charged to Affin Bank Bhd ('chargee bank') under a debenture as security for its borrowings ('Affin facility') and the properties had first to be redeemed from the chargee bank for the defendant to benefit from them. However, at the time of the signing of the settlement agreement, the plaintiff had cash flow constraints and was unable to pay the applicable redemption C sum. This led to the terms in the settlement agreement pursuant to which the defendant would have to first redeem the properties from the chargee bank. Given the need for redemption from the chargee bank, the plaintiff thus sought to assign the redemption units in lieu of cash for the defendant to effect the redemption of the properties. At all material times, the defendant had not paid D the redemption sum to the chargee bank. Subsequently, sometime around 2005, the plaintiff went into receivership pursuant to the debenture under the Affin facility. This was subsequently lifted after all of the plaintiff's borrowings were repaid via proceeds from the disposal of its properties. As a result, the properties were no longer encumbered and thus the defendant was no longer E required to redeem the properties to perfect the assignment. As a result of the foregoing, the plaintiff sought to have the redemption units reassigned back but this was met with resistance by the defendant on the basis that it was fully entitled to retain the benefit of the redemption units. The defendant asserted that it was exempted from paying the redemption sum due to a separate F arrangement which Kemas Budi Sdn Bhd ('Kemas Budi') had with the Kedah State Government. The learned judge had dismissed the plaintiff's claim and allowed the defendant's counterclaim in part. The plaintiff then filed an appeal ('Appeal 1976'). The defendant filed a cross-appeal to vary part of the High Court's decision. Concurrently and separately, the defendant filed its own G appeal ('Appeal 2023') against part of the High Court decision. These two appeals were ordered to be heard together.

Held, allowing the appeal by the appellant in Appeal 1976, dismissing the cross-appeal by the respondent; and dismissing the appeal by the respondent in H Appeal 2023:

(1) It could not be right that the beneficial interest of all the properties were to be unconditionally assigned outright to the defendant as they claimed. In fact, the defendant had not put forth any credible basis or evidence to support its interpretation that it was entitled to almost RM10m worth of I property on top of RM2,515,340.56 worth of KGCR memberships when the debt owed only amounted to RM7,758,150.56. There was more than sufficient evidence to support an inference that the intention

to transfer the redemption units was solely for the purpose of redeeming the properties. As the defendant had never made any payment of the redemption sum to the chargee bank and since the properties became unencumbered and were no longer subject to a charge, it was the court's judgment that justice and good conscience warranted the invocation of a constructive trust in favour of the plaintiff over the redemption units (see paras 32–34).

(2) When the defendant was made aware that the redemption process was no longer required, good conscience required them to reassign the redemption units back to the plaintiff. The continued refusal to do so amounted to an attempt by the defendant to unjustly enrich itself at the expense of the plaintiff. This was unconscionable conduct which necessitated the imposition of a constructive trust to satisfy the demands of justice and good conscience. The consequence was that the beneficial interest in the redemption units must revert to and revest in the plaintiff (see para 37).

(3) The mere fact that the defendant and Kemas Budi shared the same director and shareholder did not automatically mean that both companies were so intertwined that they should be deemed as one and the same. The defendant had no privity of contract with the Kedah State Authorities. The defendant could not claim to be a gratuitous beneficiary of a contract which it was not a party to. Given the factual matrix, no reason was advanced, or rather could be advanced, as to why Kemas Budi and the defendant should be treated as separate and distinct legal personalities. In the final analysis, it was not established that the defendant had given any due consideration for what it received in relation to the redemptions (see paras 38–40).

[Bahasa Malaysia summary

Perayu ('plaintif') adalah pemaju untuk projek yang dikenali sebagai Kulim Golf & Country Resort di Taman Hi-Tech Kulim ('KGCR'). KGCR merangkumi pembangunan sebuah bangunan apartment yang dikenali sebagai Kulim Heights Apartments ('apartment') dan sebuah resort golf 27 lubang. Responden ('defendan') adalah syarikat pembinaan yang telah menjalankan kerja di KGCR untuk plaintif sebagai kontraktor. Pada waktu material, plaintif berhutang kepada defendan dengan jumlah RM7,758,150,56 untuk kerja tersebut ('hutang yang terhutang'). Memandangkan kekangan aliran tunai plaintif, plaintif dan defendan akhirnya bersetuju untuk menyelesaikan hutang yang terhutang dengan memasuki perjanjian penyelesaian ('perjanjian penyelesaian') yang terdiri daripada tiga pengaturan. Perselisihan yang timbul di Mahkamah Tinggi adalah berkaitan dengan pengaturan yang mendasari pengaturan pertama di mana plaintif akan menyerahkan sejumlah 58 unit pangsapuri ('hartanah') kepada defendan sebagai pembayaran hutang yang terhutang sebagai ganti pembayaran tunai berjumlah RM5,236,590.

A Hartanah berjumlah keseluruhan nilai tunai sebanyak RM9,578,370. Sebab perbezaan antara jumlah ini dan jumlah yang terhutang adalah kerana hartanah dipisahkan menjadi dua kategori, iaitu 'unit penyelesaian' dan 'unit penebusan'. Jumlah hartanah yang sesuai dengan jumlah pengaturan pertama, iaitu, RM5,236,590 adalah 34 unit ('unit penyelesaian'). Jumlah perbezaan
B RM4,343,780 ('jumlah perbezaan') sepadan dengan nilai tunai 24 unit hartanah ('unit penebusan'). Hartanah tersebut pada masa yang material dicagarkan kepada Affin Bank Bhd ('bank pemegang gadaian') di bawah debentur sebagai jaminan untuk pinjamannya ('kemudahan Affin') dan hartanah pada mulanya perlu ditebus dari bank pemegang gadaian agar
C defendan mendapat kepentingan daripada mereka. Walau bagaimanapun, ketika menandatangani perjanjian penyelesaian, plaintif mempunyai kekangan aliran tunai dan tidak dapat membayar jumlah penebusan. Ini membawa kepada syarat-syarat dalam perjanjian penyelesaian dengan
D defendan harus terlebih dahulu menebus harta dari bank pemegang gadaian. Memandangkan perlunya penebusan dari bank pemegang gadaian, maka plaintif memohon untuk memberikan unit penebusan sebagai ganti wang tunai bagi defendan untuk melakukan penebusan hartanah. Pada semua masa yang material, defendan belum membayar jumlah penebusan kepada bank
E pemegang gadaian. Seterusnya, sekitar tahun 2005, plaintif memasuki penerimaan berdasarkan debentur di bawah kemudahan Affin. Ini kemudiannya diangkat setelah semua pinjaman plaintif dibayar melalui hasil pelupusan hartanahnya. Akibatnya, hartanah tidak lagi disekat dan dengan itu defendan tidak lagi diminta untuk menebus hartanah untuk
F menyempurnakan penyerahan hartanah tersebut. Oleh itu, plaintif berusaha agar unit penebusan dipindahkan kembali tetapi ini mendapat tentangan oleh defendan dengan alasan bahawa ia berhak sepenuhnya untuk mendapatkan kepentingan daripada unit penebusan. Defendan menegaskan bahawa ia dikecualikan daripada membayar jumlah penebusan kerana pengaturan
G berasingan antara Kemas Budi Sdn Bhd ('Kemas Budi') dengan Kerajaan Negeri Kedah. Hakim yang bijaksana telah menolak tuntutan plaintif dan membenarkan sebahagian tuntutan balas defendan. Plaintif kemudian mengemukakan rayuan ('Rayuan 1976'). Defendan mengemukakan rayuan balas untuk mengubah sebahagian keputusan Mahkamah Tinggi. Defendan
H mengajukan rayuannya sendiri ('Rayuan 2023') terhadap sebahagian keputusan Mahkamah Tinggi secara serentak dan berasingan. Kedua-dua rayuan ini diperintahkan untuk didengarkan bersama.

Diputuskan, membenarkan rayuan perayu dalam Rayuan 1976, menolak
I rayuan balas responden; dan menolak rayuan responden dalam Rayuan 2023:

(1) Adalah tidak betul bahawa hak berkepentingan daripada semua harta itu diserahkan secara tanpa syarat kepada defendan sebagaimana yang mereka dakwa. Malah, defendan tidak mengemukakan asas atau keterangan yang boleh dipercayai untuk menyokong tafsirannya bahawa

dia berhak mendapatkan hartanah bernilai hampir RM10 juta di atas keahlian KGCR bernilai RM2,515,340.56 apabila hutang yang terhutang hanya berjumlah RM7,758,150.56. Terdapat lebih dari cukup keterangan untuk menyokong kesimpulan bahawa niat untuk memindahkan unit penebusan adalah semata-mata untuk tujuan menebus hartanah. Oleh kerana defendan tidak pernah membuat pembayaran sejumlah wang penebusan kepada bank pemegang gadaian dan kerana hartanah tidak disekat dan tidak lagi di bawah cagaran, maka adalah keputusan mahkamah bahawa keadilan dan hati nurani yang baik membolehkan pemakaian amanah konstruktif berpihak kepada plaintif di atas unit penebusan (lihat perenggan 32–34).

(2) Ketika defendan diberitahu bahawa proses penebusan tidak lagi diperlukan, hati nurani yang baik mengharuskan mereka menyerahkan kembali unit penebusan kepada plaintif. Penolakan berterusan memberi maksud dengan cubaan defendan untuk memperkayakan dirinya dengan perbelanjaan plaintif. Ini adalah tingkah laku yang tidak masuk akal yang mengharuskan penggunaan amanah konstruktif untuk memenuhi tuntutan keadilan dan hati nurani yang baik. Akibatnya adalah bahawa hak berkepentingan dalam unit penebusan mesti dikembalikan dan ditukar semula kepada plaintif (lihat perenggan 37).

(3) Kenyataan bahawa defendan dan Kemas Budi mempunyai pengarah dan pemegang saham yang sama tidak secara automatik bermaksud bahawa kedua-dua syarikat itu saling berkaitan sehingga mereka harus dianggap sebagai satu dan sama. Defendan tidak memiliki priviti kontrak dengan Kerajaan Negeri Kedah. Defendan tidak boleh menuntut sebagai benefisiari kontrak yang bukan menjadi pihak. Berdasarkan matriks faktual, tidak ada alasan telah dikemukakan, atau lebih tepatnya dapat dikemukakan, mengapa Kemas Budi dan defendan harus dianggap sebagai personaliti undang-undang yang berasingan dan berbeza. Dalam analisis terakhir, tidak dinyatakan bahwa defendan telah memberikan pertimbangan sewajarnya untuk apa yang diterimanya berkaitan dengan penebusan (lihat perenggan 38–40).]

Cases referred to

Carl-Zeiss-Stiftung v Herbert Smith & Co and another (No 2) [1969] 2 Ch 276, CA (refd)

Investors Compensation Scheme Ltd v West Bromwich Building Society; Investors Compensation Scheme Ltd v Hopkin & Sons (a firm) and others; Alford v West Bromwich Building Society and others; Armitage v West Bromwich Building Society and others [1998] 1 WLR 896, HL (refd)

Perbadanan Kemajuan Pertanian Selangor v JW Properties Sdn Bhd [2017] MLJU 1107; [2017] 8 CLJ 392, FC (folld)

Appeal from: Civil Suit No BA-22NCVC-671–11 of 2017 (High Court, Shah Alam)

Malik Imtiaz Sarwar (Sivabalan, Goh Wan Ping and Lim Yvonne with him) (Mastura Partnership) in Civil Appeal No B-02(NCVC)(W)-1976–09 of 2018 for the appellant.
Joslyne Goonting (Lum May Lan and Tan Yiwen with him) (ML Lum & Co) in Civil Appeal No B-02(NCVC)(W)-2023–10 of 2018 for the appellant.
Malik Imtiaz Sarwar (Sivabalan, Goh Wan Ping and Lim Yvonne with him) (Mastura Partnership) in Civil Appeal No B-02(NCVC)(W)-2023–10 of 2018 for the respondent.
Joslyne Goonting (Lum May Lan and Tan Yiwen with him) (ML Lum & Co) in Civil Appeal No B-02(NCVC)(W)-1976–09 of 2018 for the respondent.

Harmindar Singh JCA (delivering judgment of the court):

[1] There are two appeals before us. They were ordered to be heard together. The appeals arise from the decision of the Shah Alam High Court dated 24 August 2018. After a trial, the learned judge had dismissed the plaintiff's claim and allowed the defendant's counterclaim in part.

[2] The plaintiff in the High Court then filed Appeal No B-02(NCVC)(W)-1976–09 of 2018 ('Appeal 1976'). The defendant filed a cross-appeal to vary part of the High Court's decision. Concurrently and separately, the defendant filed its own appeal vide Appeal No B-02(NCVC)(W)-2023–10 of 2018 ('Appeal 2023') against part of the High Court decision.

[3] After careful consideration of the written submissions filed by all parties and after hearing oral arguments, we unanimously allowed the appeal of the plaintiff/appellant in Appeal 1976 and dismissed the cross-appeal. The defendant's appeal in Appeal 2023 was also dismissed. As a consequence, judgment was entered in accordance with the plaintiff's claim in the writ of summons.

[4] We now provide the reasons for so doing which will form the judgment of this court. For ease of reference, the parties will be referred to as they were in the High Court or by their abbreviations.

BACKGROUND FACTS

[5] In view of the issues raised in the instant appeals, it is necessary to set out the relevant background facts. These are well set out by the parties in their

written submissions and also appear in the judgment of the learned trial judge. As such, we would only need to restate them as follows.

[6] The plaintiff was and is a developer for a project known as the Kulim Golf & Country Resort within the Kulim Hi-Tech Park ('KGCR'). KGCR included the development of an apartment building known as the Kulim Heights Apartments ('the apartments') and a 27-hole golf resort.

[7] The defendant was and is a construction company which had undertaken works in KGCR for the plaintiff as a contractor. At the material time, the plaintiff was indebted to the defendant for the sum of RM7,758,150.56 for such works ('debt owed').

[8] In view of the plaintiff's cash flow constraints, the plaintiff and the defendant ultimately agreed to settle the debt owed by entering into a settlement agreement dated 15 April 2004 ('settlement agreement'). The salient terms of the settlement agreement were as follows:

(a) the plaintiff would assign a total of 58 units of the apartments ('the properties') to the defendant as part payment of the debt owed in lieu of cash payment amounting to RM5,236,590 ('first arrangement'). The properties amounted to a total cash value of RM9,578,370. There is of course a difference between this sum and the sum owed under the first arrangement. The reason for this discrepancy is due to the properties being separated into two categories, namely the 'Settlement Units' and the 'Redemption Units'. The total number of properties which corresponded to the sum of first arrangement, that is, RM5,236,590 was 34 units ('settlement units') as set out in the first page of Appendix 1 of the settlement agreement. The differential sum of RM4,343,780 ('the differential sum') corresponded to the cash value of 24 units of the properties ('redemption units') as set out in the second page of Appendix 1 of the settlement agreement;

(b) the plaintiff would further transfer a total of 340 KGCR memberships to the defendant as part payment of the debt owed in lieu of cash payment amounting to RM2,515,340.56 ('the second arrangement'); and

(c) the plaintiff would pay the defendant RM6,220 in cash being the payment for the outstanding sum owed after taking into consideration the first and the second arrangements ('the third arrangement').

[9] The total sum of the first, second and third arrangements (without the differential sum) amounted to RM7,758,150.56, which was the debt owed.

[10] It was undisputed that the plaintiff had fulfilled all its obligations as set out above. However, the dispute which arose in the High Court pertained to the underlying arrangement vis a vis the first arrangement. In this regard, the properties were at the material time charged to Affin Bank Bhd ('chargee bank') under a debenture as security for its borrowings ('Affin facility'). This necessarily meant that the properties had first to be redeemed from the chargee bank for the defendant to benefit from them. This was acknowledged by the parties as per Recital C of the settlement agreement.

[11] However, at the time of the signing of the settlement agreement, the plaintiff had cash flow constraints and was unable to pay the applicable redemption sum. It was therefore agreed that the defendant would undertake the same. This led to the terms in the settlement agreement pursuant to which the defendant would have to first redeem the properties from the chargee bank at a rate of RM75,000 per unit before the assignment from the plaintiff could be perfected.

However, in the event of any claim for redemption by the chargee bank exceeded the sum of RM75,000 per unit, the excess sum shall be paid by the plaintiff.

[12] Given the need for redemption from the chargee bank, the plaintiff thus sought to assign the redemption units in lieu of cash for the defendant to effect the redemption of the properties. In this respect, given that the redemption units themselves (in addition to the settlement units) would also have to be redeemed, the number of redemption units to be assigned was computed based on the cash value required to redeem all 58 units of the properties.

[13] It was not disputed that the total cash value of the redemption units was valued at RM4,343,780. This sum was largely reflective of the total sum required to redeem the properties, aside from a shortfall of RM6,220 which was ultimately paid in cash by way of the third arrangement.

[14] In the upshot, the plaintiff entered into the settlement agreement on the specific understanding that:

(a) the settlement units were assigned as part payment of the debt owed under the first arrangement;

(b) the redemption units were assigned solely for the purposes of enabling the defendant to redeem the properties from the chargee bank; and

(c) the defendant would pay a total sum of RM4,350,000 to the chargee bank to redeem the properties ('the total redemption sum').

[15] It was pertinent to note that at all material times, the defendant had not paid the redemption sum to the chargee bank. Subsequently, sometime around 2005, the plaintiff went into receivership pursuant to the debenture under the Affin facility. This was subsequently lifted on or about 25 September 2007 after all of the plaintiff's borrowings were repaid via proceeds from the disposal of its properties. As a result, the properties were no longer encumbered and thus the defendant was no longer required to redeem the properties to perfect the assignment. It was asserted by the plaintiff that the specific purpose for the assignment of the redemption units had thus been rendered academic and impossible to achieve.

[16] As a result of the foregoing, the plaintiff sought to have the redemption units reassigned back but this was met with resistance by the defendant on the basis that it was fully entitled to retain the benefit of the redemption units. It asserted, on behalf of the defendant, that it was exempted from paying the redemption sum due to a separate arrangement which Kemas Budi Sdn Bhd ('Kemas Budi') had with the Kedah State Government.

[17] In this regard, the defendant took the view that it was a related company of Kemas Budi on the sole basis that both Kemas Budi and the defendant share common directors and shareholders. It was also asserted that Kemas Budi had entered into a share sale agreement with the Kedah State Authorities to sell its 29.4% shares in the plaintiff in return for, inter alia, the Kedah State Authorities to settle all outstanding liabilities owed by Kemas Budi and the defendant to any party ('the Kemas Budi share sale arrangement').

[18] In this way, it was suggested that the redemption sum was indirectly paid by the Kedah State Authorities in exchange for the sale of Kemas Budi's stake in the plaintiff, thereby absolving the defendant from all liabilities including the obligation to pay the redemption sum.

AT THE HIGH COURT

[19] Arising out of the dispute, the plaintiff filed the present proceedings in the High Court, seeking, inter alia, an order compelling the defendant to reassign the redemption units back to the plaintiff with no encumbrances; and an order compelling the defendant to settle all outstanding maintenance charges, taxes, assessment, quit rent and insurance for the redemption units before reassignment to the plaintiff.

[20] The defendant, inter alia, took the position that it had discharged its obligations to pay the redemption sum under the settlement agreement as the

Kedah State Authorities had absolved all the defendant's debt in consideration for the divestment of Kemas Budi's shares in the plaintiff to the Kedah State Authorities.

[21] The decision of the High Court ultimately turned on the interpretation of the settlement agreement in determining the true bargain struck between the parties vis a vis the redemption units, namely, whether on a true construction of the settlement agreement, there was an intention to pass beneficial interest and ownership in the redemption units as an outright assignment to the defendant or whether they were assigned solely for the purposes of paying the redemption sum to the chargee bank; and, if it was the latter, whether the defendant's non-payment of the redemption sum to the chargee bank gave rise to a trust in favour of the plaintiff in respect of the redemption units.

[22] In a nutshell, the High Court held, inter alia, that:

(a) no evidence has been led or adduced by the plaintiff to show from the surrounding circumstances that the plaintiff had intended that the redemption units were to be transferred to the defendant as the price for effecting the payment of the redemption sum and that in default, the redemption units were to be returned to the plaintiff *in specie*;

(b) the plaintiff had not demonstrated that justice and good conscience require that an inference be made of the existence of a constructive trust in favour of the plaintiff;

(c) there was insufficient evidence from which an inference of such an intention can be made. A resulting trust, which was the premise of the plaintiff's pleaded case, could not be said to have come into existence; and

(d) on the totality of the evidence, the plaintiff had failed to prove its pleaded claim on a balance of probabilities, particularly as to the issue of reassignment of the properties to the plaintiff upon non-fulfilment of an essential condition by the defendant under the settlement agreement.

OUR ANALYSIS AND FINDINGS

[23] Before us, much of the same arguments were canvassed by each side. The crux of the whole appeal, in our view, also turned on the interpretation of the settlement agreement to determine the true bargain struck between the parties. In short, was it a case of outright assignment of the redemption units or was there a specific purpose for the assignment under the settlement agreement? In this context, as alluded to earlier, the learned judge found no evidence that the redemption units were to be transferred to the defendant as

the price for effecting the payment of the redemption sum. A

[24] As far as the law is concerned, there does not appear to be much controversy in the principles applicable in the interpretation of a contract. At the outset, we agreed with the proposition that the commercially sensible interpretation which yields to business common sense should prevail. B

[25] In this regard, we found it useful to refer to the leading case of *Investors Compensation Scheme Ltd v West Bromwich Building Society; Investors Compensation Scheme Ltd v Hopkin & Sons (a firm) and others; Alford v West Bromwich Building Society and others; Armitage v West Bromwich Building Society and others* [1998] 1 WLR 896 where Lord Hoffman observed (at p 912): C

> ... The result has been, subject to one important exception, to assimilate the way in which such documents are interpreted by judges to the common sense principles by which any serious utterance would be interpreted in ordinary life. Almost all the old intellectual baggage of 'legal' interpretation has been discarded. The principles may be summarised as follows: D
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> (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract. E
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> (2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact', but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man. F
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> (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them. G H
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> (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, I

for whatever reason, have used the wrong words or syntax: see *Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749.

(5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Dlplock made this point more vigorously when he said in *Antaios Compania Naviera SA v Salen Rederierna AB* [1985] AC 191, 201:

> If detailed semantic and syntactical analysis of words in a commercial contract is going to lead to conclusion that flouts business common sense, it must be made to yield to business common sense.

[26] With these principles in mind, our interpretation of the settlement agreement yielded the following analysis. In the first place, it was hugely significant that there were two lists found in Appendix 1 of the settlement agreement. The first list pertains to the settlement units where the price of 34 properties were listed, amounting to the grand total of RM5,236,590 being the settlement sum under the first arrangement. A handwritten annotation at the top right corner of the page which stated 'Original Settlement 34 Units' further confirms this. And this was not disputed by the defendant.

[27] The second list pertains to the redemption units where the price of 24 properties were listed, amounting to the grand total of RM4,343,780 being the redemption sum (less RM6,220 which was to be paid in cash). A handwritten annotation on the top right corner of the page indicates 'Additional 24 units to cover for the redemption sum for the original 34 units' further confirms this. Again, this was not disputed by the defendant. Furthermore, and this is significant, SD1, during cross-examination, agreed that the total figure of the redemption units amounted to RM4,343,780.

[28] That this was indeed the intention of the parties, in that the redemption units were being transferred to the defendant for the purpose of effecting payment of the redemption sum, was admitted by the defendant's witness, SD1. In the letter dated 11 March 2004, referred to as ID1 in the court below, it was specifically mentioned that the additional 24 units were included to make up for the total redemption amount. SD1 confirmed in his testimony that these were indeed part of the discussions.

[29] We noted that there was some objection to the admissibility of this letter on the ground that the maker was not called to testify. However, we considered

that the reasons advanced for the objection were rather curious given that the authenticity and the contents of the letter were both not disputed by SD1. The defendant was the recipient of this letter and it was in fact directly addressed to the witness SD1. The learned judge, with respect, was quite wrong in refusing to accept this letter into evidence. The learned judge should have considered that the said letter and its contents were both reliable and accurate and therefore safe to act upon which should, in our view, form the acid test in any consideration of the admissibility of evidence. Such evidence was also admissible as it formed the background knowledge which was available to the parties at the time of the contract.

[30] On a reasonable and commercial interpretation of the settlement agreement, it was evident that it was never the plaintiff's intention for the defendant to receive a settlement sum which was over and beyond the debt owed. Neither was it the plaintiff's intention for the defendant to receive a gift in the sum of RM4,343,780.

[31] In this regard, the learned High Court judge ought to have considered the underlying basis of the plaintiff's assignment of the redemption units. He ought to have asked himself whether there was a valid commercial reason underlying the arrangement. With respect, the learned judge fell into error by failing to apply his mind to the considerations aforesaid and in failing to do so, had failed to evaluate the evidence in totality. It appeared that the learned judge had considered the words literally without giving due consideration to the factual matrix.

[32] In our considered view, it cannot be right that the beneficial interest of all the properties were to be unconditionally assigned outright to the defendant as they claimed. This would effectively mean a mark-up of approximately 83% for the purposes of repaying the debt owed. Any reasonable commercial party in the plaintiff's position, barring exceptional reasons, would not have conceivably agreed to such an arrangement.

[33] It was also not the case, and not proven anyway, that the plaintiff had gratuitously conveyed the redemption properties to the defendant. In fact, we agreed with the submission that the defendant had not put forth any credible basis or evidence to support its interpretation that it is entitled to almost RM10m worth of property on top of RM2,515,340.56 worth of KGCR memberships when the debt owed only amounted to RM7,758,150.56. The plaintiff's criticism that this was an absurdity, augmented by the fact that both the plaintiff and the defendant are commercial parties with an outcome that made no commercial sense, was not altogether without merit.

[34] In our assessment, given the circumstances as outlined in the foregoing, there was more than sufficient evidence to support an inference that the intention to transfer the redemption units was solely for the purpose of redeeming the properties. As the defendant had never made any payment of the redemption sum to the chargee bank and since the properties became unencumbered and were no longer subject to a charge, it was our judgment that justice and good conscience warranted the invocation of a constructive trust in favour of the plaintiff over the redemption units.

[35] Now, the law in relation to constructive trusts is fairly trite although by definition the concept remains deliberately vague and elusive as noted by the authors of *Lewin on Trusts* (19th Ed) at p 294 para 7-010 citing the comment of Edmund-Davies LJ in *Carl-Zeiss-Stiftung v Herbert Smith & Co and another (No 2)* [1969] 2 Ch 276 at p 300. That this is so is due mostly to the myriad of circumstances which may arise and which the courts must then consider before ascertaining the justice of the case.

[36] Although various authorities were cited to us on the question of trusts, we found most instructive the exposition by Zulkefli Ahmad Makinudin PCA in *Perbadanan Kemajuan Pertanian Selangor v JW Properties Sdn Bhd* [2017] MLJU 1107; [2017] 8 CLJ 392 as follows:

> [57] It is to be noted that a constructive trust is a creature of equity. By its very nature, whether or not a constructive trust arises in the absence of the consent of the State Authority to transfer the land is very much dependent on the facts of the case. As regards the present case a relevant factor to consider is whether there was any unconscionable conduct on the part of the appellant which would attract the intervention of equity.
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> [58] From decided case authorities it has been established as a principle of law that constructive trust arises by operation of law whenever the circumstances are such that it would be unconscionable for the owner of the property (usually but not necessarily the legal owner) to assert his own beneficial interest in the property and deny the beneficial interest of another (see the cases of (1) *Takako Sakao v Ng Pek Yuen & Anor* [2009] 6 MLJ 751; [2010] 1 CLJ 381 (FC) and (2) *Vellasamy Pennusamy & Ors v Gurbachan Singh Bagawan Singh & Ors* [2010] 5 MLJ 437; [2012] 2 CLJ 712 (CA)).
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> [59] It has also been held that a constructive trust is a trust which is imposed by equity in order to satisfy the demands of justice and good conscience without reference to any express or presumed intention of the parties (see the case of *Hassan Kadir & Ors v Mohamed Moidu Mohamed & Anor* [2011] 5 CLJ 136 (FC)). A constructive trust is a remedial device that is employed to prevent unjust enrichment. It has the effect of taking the title to the property from one person whose title unjustly enriches him, and transferring it to another who has been unjustly deprived of it (see the case of *Tay Choo Foo v Tengku Mohd Saad Tengku*

Mansur & Ors And Another Appeal [2009] 1 MLJ 289; [2009] 2 CLJ 363 (CA)). A

[37] Following from the law and the evidence adduced, it is our judgment that when the defendant were made aware that the redemption process was no longer required, good conscience required them to reassign the redemption units back to the plaintiff. The continued refusal to do so amounted to an attempt by the defendant to unjustly enrich itself at the expense of the plaintiff. In our view, this was unconscionable conduct which necessitated the imposition of a constructive trust to satisfy the demands of justice and good conscience. The consequence is that the beneficial interest in the redemption units must revert to and revest in the plaintiff. B C

[38] In coming to this conclusion, we have not overlooked the submissions by the defendant that a third party, namely the Kedah State Authorities, had absolved the defendant of its liabilities by virtue of the Kemas Budi share sale arrangement. In our view, the mere fact that the defendant and Kemas Budi share the same director and shareholder does not automatically mean that both companies are so intertwined that they should be deemed as one and the same. D

[39] It seemed to us that the common shareholder SD1 was seeking to conflate the liabilities of both companies to further his own personal interest in the Kemas Budi share sale arrangement. In this context, it is noteworthy that the defendant had no privity of contract with the Kedah State Authorities. The defendant could not claim to be a gratuitous beneficiary of a contract which it was not a party to. E F

[40] Given the factual matrix, no reason was advanced, or rather could be advanced, as to why Kemas Budi and the defendant should be treated as separate and distinct legal personalities. In the final analysis, it was not established that the defendant had given any due consideration for what it received in relation to the redemptions. G

CONCLUSION/ORDERS

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[41] In the circumstances, and for the reasons we have provided, we allowed the appeal of the plaintiff/appellant in Appeal 1976. The order of the High Court was set aside. Accordingly, Appeal 2023 was dismissed except, as conceded, for the prayer by the appellant in regard to the two properties in the first list to Appendix 1 in the settlement agreement. The cross-appeal was also dismissed. As a consequential order, we ordered for the transfer of the 23 apartment units to the plaintiff with no encumbrances. We also ordered the defendant to pay costs here and below of RM50,000 to the defendant subject to allocator. Orders accordingly. I

A *Appeal by appellant in Appeal 1976 allowed; cross-appeal of respondent dismissed; and appeal by respondent in Appeal 2023 dismissed.*

Reported by Nabilah Syahida Abdullah Salleh

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